

65 - INDEPENDENT AGENCIES - REGULATORY

407 - PUBLIC UTILITIES COMMISSION

CHAPTER 307 - SALE OF CAPACITY AND ENERGY; EXTENSIONS FOR DIVESTITURE OF ASSETS

SUMMARY - This rule implements 35-A M.R.S.A. § 3204(4)(sale of capacity and energy of generation assets and generation-related business activities that are not divested by investor-owned electric utilities) and 35-A M.R.S.A. § 3204(3)(deadline for divestiture for certain assets).

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§ 1 DEFINITIONS

A. Capacity and Energy. "Capacity and Energy" means the output from generation assets and includes any ancillary services (e.g., spinning reserve) which may be available from generation assets and generation-related business activities subject to this rule.

B. Facility. "Facility" means any specific facility which delivers capacity or energy to a utility under contract, or deliveries from the market in cases where the seller has the option to provide deliveries either from a specific facility or from the market.

C. Generation Assets. "Generation assets" means all real estate, fixtures and personal property owned, controlled, operated or managed in connection with, or to facilitate, the generation of electric power.

D. Utility. "Utility" means either an investor-owned electric utility or an investor-owned transmission and distribution utility, or both, depending on the context, including the date of a required event.

§ 2 APPLICABILITY OF CHAPTER

A. Utilities Subject to this Chapter

Prior to March 1, 2000, this Chapter shall apply to all investor-owned electric utilities. On and after March 1, 2000, this Chapter shall apply to investor-owned transmission and distribution utilities.

B. Capacity and Energy Subject to this Chapter

Except as noted in Section 2(C), Sections 3 through 9 and 11 of this Chapter apply to all interests held by a utility in electric capacity and energy from any generation assets and generation-related business activities, including purchased power contracts, that are not divested pursuant to 35-A M.R.S.A. § 3204(1), including:

1. Any contract with a qualifying facility, or any contract with a party other than a qualifying facility or affiliated interest entered into solely for the purpose of restructuring a contract with a qualifying facility;
2. Ownership interest in a nuclear power plant;
3. Ownership interest in a facility located outside the United States; and
4. Ownership interest or entitlement in a generation asset or generation-related business activity for which the Commission has granted an

extension, pursuant to § 3204(3) and section 10 of this Chapter, that allows a utility to divest after March 1, 2000.

C. Exception

Sections 3 through 9 of this Chapter shall not apply to any capacity or energy for generation assets and generation business, as described in section 2(B) of this Chapter that a utility has sold pursuant to a long term power sales agreement entered into prior to July 1, 1998.

D. Extension of Divestiture

Section 10 of this Chapter applies to an application by a utility to the Commission for an extension to allow it to divest one or more generation assets or generation-related business activities after March 1, 2000.

§ 3 GENERAL REQUIREMENT FOR SALE OF CAPACITY AND ENERGY

Each utility subject to this Chapter shall offer for sale and shall sell its interests in the energy and capacity described in section 2(B) pursuant to the provisions of this Chapter.

§ 4 CONDITIONS APPLICABLE TO SALES AND UTILITY RENEGOTIATIONS DURING SALE PERIODS

A. Renegotiations by Utilities of Contracts for Capacity and Energy

Utilities subject to this Chapter shall have the right at any time to renegotiate any contract that entitles it to capacity and energy for the purpose of meeting its obligation to minimize stranded costs. No renegotiated contract shall become effective until the end of the current sale period for capacity and energy unless:

1. the amount and fuel source of the output available to the purchaser of the capacity and energy pursuant to this rule are unchanged ; or
2. the purchaser consents to a change in the output or fuel source type.

B. Subsequent Divestiture by Utilities

All sales shall be subject to the obligation of the utility to divest a generation asset on the date or within the time period specified by the Commission in an extension order issued pursuant to 35-A M.R.S.A. § 3204(3) and section 10 of this Chapter, and all purchasers shall be subject to the risk that the capacity and energy from that generation asset may not be available following the divestiture.

C. Risk of Nonperformance; Damages

Each utility subject to this Chapter shall choose between one of the following approaches to damages. The standard form contract required by section 6(B) shall include a provision implementing the portion of this subsection chosen by the utility.

1. A purchaser of capacity and energy shall have no recourse against the utility in the event that the owner or operator of the generation asset does not provide the expected amount of capacity or energy or otherwise defaults. In the event of a default by the owner or operator as a result of which the utility collects damages, the damages will be allocated between the utility and the purchaser(s) on a reasonable pro rata basis.

2. A utility may propose to the Commission other approaches to damages at the time it submits its request for bids and standard form contract pursuant to section 6(B)(3) of this Chapter.

§ 5 DATES FOR ISSUANCE OF REQUESTS FOR BIDS; TERMINATION OF BIDDING PROCESS

A. Initial Round

On August 2, 1999, each electric utility subject to this Chapter shall issue a request for bids for the electric capacity and energy required to be sold by this Chapter.

B. Subsequent Rounds

On dates thereafter as ordered by the Commission, each utility subject to this Chapter shall issue a new request for bids for the electric capacity and energy required to be sold by this Chapter.

C. Additional Bidding

The Commission may also order a utility to issue a request for bids, pursuant to section 8(B), consistent with section 8(B) or section 10(C). To expedite the selection of a new purchaser, the Commission may waive any of the requirements of section 5.

D. Termination of Bidding Process

When a utility subject to the provisions of this Chapter no longer has an interest in any assets or contracts that are subject to sale of energy and capacity requirements of this Chapter, the utility shall notify the Commission, and the utility will no longer be subject to the provisions of this Chapter.

§ 6 REQUIREMENTS FOR REQUESTS FOR BIDS, BIDDING AND SALE

A. Asset Categories

The Request for Bids shall permit bidders to provide separate bids for any of the following individual categories, or a single bid for any combination (including all) of the following categories:

1. Hydroelectric and biomass sources which qualify as a renewable resource under 35-A M.R.S.A. § 3210;
2. Other sources which qualify as a renewable resource under 35-A M.R.S.A. § 3210;
3. Nuclear power entitlements;
4. Any other category or subcategory approved by the Commission pursuant to section 6(B)(3); or
5. All other generation sources.

B. Contents of Requests for Bids; Commission Approval

1. Bidding Requirements

Each request for bids shall state the bidding and pricing requirements contained in section 6(C).

2. Information

At a minimum, the following information shall be provided with each Request for Bids issued pursuant to this Chapter:

- a. a list of the contracts, entitlements, and ownership interests, the capacity and/or energy to which the utility has an entitlement and the date through which the entitlement is held;

- b. copies of all contracts enumerated; or, if providing copies of all contracts would be inconvenient because of their number and size, a statement describing a convenient location and times for viewing the contracts. Copies shall be provided or viewing permitted subject to any confidentiality requirements set forth in the contracts limiting bidders' use of any confidential information to the preparation of their bids;
- c. the on-peak period which shall be Monday through Friday from 7 A.M. to 11 P.M., except for holidays recognized by ISO-NE or the equivalent entity in the Maritimes Control Area and the off-peak period which shall be all other hours.
- d. for each facility whose output is subject to the bidding requirements of this Chapter, the facility's monthly capacity and energy output, including any ancillary services provided, in the most recent 3-year period, provided individually by the facility and in aggregate by each of the categories of assets and generation-related business activities listed in the request for bids; the monthly capacity and energy data shall be provided separately for the peak and off-peak periods described in subparagraph c;
- e. identification of the 12-month period that will be used for capacity and energy quantities used in the net present value calculation required by section 7(D);
- f. to the extent the utility has such actual knowledge at the time it issues the Request for Bids, for each facility whose output is subject to the bidding requirements of this Chapter, a description of any contractual provision or other factor that will have the effect of substantially changing the output of a facility during the bid period as compared to the output amounts provided pursuant to subsection (B)(2)(d) and a description of any subsequent divestiture that may apply during the bid period pursuant to Section (4)(B).
- g. a copy of the proposed standard contract between the utility and the purchaser of entitlements to capacity and energy required to be sold by this Chapter.

3. Approval of Request for Bids and Standard Form Contract by Commission

Each utility subject to this Chapter shall submit its proposed initial request for bids, including the proposed standard form contract and all other attachments, to the Commission on or before May 1, 1999. For subsequent requests for bids, each utility shall submit its proposed request three months prior to the issuance date of the request for bids. Approval and disapproval of the requests for bids is delegated to the Director of Technical Analysis. The Director shall provide notice to a utility of any questions, objections or grounds for rejection within 30 days after the filing of the proposed request for bids. The Director shall approve or disapprove the request for bids within 60 days after its filing and, if necessary, may order the utility to make specified changes.

C. Bid Pricing

1. Separate Categories

Bidders may provide multiple bids. Any individual bid shall be for an individual category, a group of categories specified in the bid, or all categories. Bidders shall provide separate prices for each month of the period for which bids are requested. Bidders shall provide absolute prices and shall not define prices by formulae or by reference to an index.

2. Separate Pricing of Capacity and Energy

Bids shall include separate prices for the capacity component in dollars per kilowatt month and the energy component in cents per kilowatt hour. Bids for both components shall include separate prices for peak and off-peak periods as defined in 6(B)(2)(c).

3. Bid Increments

Bids may be in increments of 20%, 40%, 60%, 80% or 100% of the entire category. Any bid for a percentage of the entire category that is greater than 20% shall also include a bid for each 20% multiple up to the highest bid percentage. Bid prices may be different for each 20% increment. Bids shall be for a stated percentage of the capacity and energy available in the entire category, and not for stated amounts of capacity and energy.

§ 7 SELECTION OF BIDDERS; SALE

A. Eligible Bidders; Bidding Requirements; Time for Filing Bids; Noncompliance

Any person, including an affiliated competitive provider of a utility subject to this Chapter, may bid. Bids for the first sale period shall be filed not later than noon on October 1, 1999. Bids for subsequent sale periods shall be filed not later than noon on the date established in the request for bids. Bids shall be sealed and shall comply with all requirements of the request for bids approved by the Commission, including the provision of all required pricing and other information. There shall be a single round of bids for each sale period. A bid that does not comply with any material requirement of the request for bids is disqualified, subject to review by the Commission of the utility's decision that the requirement was material and that the bidder did not comply with the requirement. Within 7 days of being notified of a disqualification, the Commission will complete its review or notify the utility that it requires additional time for review.

B. Requirements Applicable to Utilities and Affiliated Competitive Providers

Utilities subject to this Chapter and affiliated competitive providers (as defined in 35-A M.R.S.A. § 3205(1)(A)) of those utilities shall comply with the standards of conduct contained in 35-A M.R.S.A. § 3205(3) and Chapter 304 of the Commission's rules.

C. Financial Qualifications of Bidders

Prior to executing a contract with a winning bidder, the utility shall determine whether that bidder is financially qualified to meet the payment commitments of the contract for sale.

D. Selection

On or before November 1, 1999 for the first round of bids, and on dates thereafter as ordered by the Commission for subsequent rounds, utilities subject to this Chapter shall select the winning bidder(s) based on the highest price or combination of prices presented by financially qualified bidders. To determine the highest bid(s), a utility shall calculate the net present value of each bid. To determine net present values, a utility shall multiply each monthly bid price (including time-of-day prices) by the quantities (in kW and kWh) of capacity and energy provided to the utility in the applicable pricing category during the same month of the recent annual period identified in the information provided with the request for bids pursuant to Section 6(B)(2)(e), discounted by the utility's overall before-tax cost of capital as last found by the Commission. If, in the opinion of the utility, one or more months in a recent test period do not reasonably represent the output it expects to receive during the sale period, the

utility may use an average of data from the same month of other recent test periods. The utility shall provide notice of its intent to use alternative data in the information provided with the request for bids pursuant to Section 6(B)(2)(e). Utilities shall not execute contracts with the winning bidder(s) until directed to do so by the Commission pursuant to section 7(I).

E. Effective Date of Sales; Length of Sales Periods

The effective date for the first sale period shall be March 1, 2000 and the sale of capacity and energy shall be for a 2-year period. For subsequent sale periods, the effective date for a sale shall be the day following the expiration of the preceding sale period.

By order issued not less than 4 months prior to the date for issuance of each request for bids, the Commission shall establish the duration of the period for the next sale of capacity and energy.

F. General Principles Applicable to Determination of Financial Qualifications and Selection of Highest Bidders

Utilities subject to this Chapter shall conduct all bidding processes, including determining the financial qualifications of and selecting the highest bidder, in a manner that does not discriminate among bidders and that is consistent with the purposes of maximizing the sale price of the capacity and energy sold pursuant to this Chapter and of minimizing stranded costs.

G. Market Power

If the Commission conducts a proceeding addressing the issue of market concentration or market power, and finds that no single purchaser should be allowed to purchase all of the capacity and energy from contracts with qualifying facilities and other renewable resources as described in section 6(A)(1), the Commission shall issue an order in that proceeding limiting the percentage of capacity and energy from qualifying facilities and other renewable resources that any single bidder may purchase pursuant to this Chapter. If the Commission in that proceeding finds that a specific entity would obtain an unacceptable level of market concentration if it purchased more than a specified percentage of the capacity and energy from qualifying facilities and other renewable resources available under this Chapter, the Commission by order in that proceeding may limit the percentage of such capacity and energy the entity may purchase pursuant to this Chapter.

H. Submission of Information to Commission

On or before November 1, 1999 for the first round of bids and on dates thereafter as ordered by the Commission, a utility subject to this Chapter shall notify the Commission of its determination of the winning bidder(s) made pursuant to section 7(D).

At this time, the utility shall include the identities of the winning bidder(s), the bid price(s) and an explanation and documentation of the analyses it used to determine the winning bid(s), and a summary of the losing bids. Utilities shall inform the Commission of any grounds for which it believes the sale of capacity and energy to a winning bidder selected pursuant to section 7(D) would not be in the public interest.

I. Commission Review; Rejection of Bids

On or before December 1, 1999 for the first round of bids, and on dates thereafter as ordered by the Commission for subsequent rounds, the Commission shall inform utilities whether contracts with winning bidder(s) should be executed. Upon a finding that stranded costs would not be reasonably mitigated by acceptance of a winning bid, the Commission may order the utility to reject a winning bid, and to either accept an alternative bid or sell the rights to the capacity and energy in the regional wholesale bulk power markets until the selection of a new purchaser.

J. Stranded Costs

The Commission shall use the bid price(s) of the winning bid(s) in calculating a utility's stranded costs for the applicable generation assets or generation-related business activities, unless it finds, in a proceeding that addresses stranded costs, that the utility, in its bidding process or selection, did not act prudently to maximize the sales price or to minimize stranded costs. In any such proceeding addressing stranded costs, the Commission may issue appropriate orders necessary to protect confidential information of bidders, including non-winning bidders.

§ 8 PAYMENT BY PURCHASERS; DEFAULT

A. Payment

Purchasers of capacity and energy sold pursuant to this Chapter shall pay utilities for capacity and energy each month, not later than 20 days after the close of the billing period established in the contract between the utility and the purchaser unless the utility and the bidder agree upon a more rapid payment schedule.

B. Default

If a purchaser of capacity and energy fails to make required payments to the utility or otherwise defaults in its obligations, and such default is material, the utility shall immediately notify the Commission. The utility shall engage in reasonable business practices in addressing the default. In the event of a default, the utility may sell the capacity and energy to an alternative purchaser or in the regional wholesale bulk power markets. The utility may not sell to an alternative purchaser pursuant to a contract term that extends beyond the expiration of the current sales period as established in section 7(E) without the prior approval of the Commission.

§ 9 EXCEPTION TO BIDDING AND SALE REQUIREMENTS

The bidding and sale requirements of this Chapter shall not apply to any capacity or energy that the Commission, pursuant to 35-A M.R.S.A. § 3204(4), determines is necessary for the utility to perform its obligations as a transmission and distribution utility in an efficient manner. Any utility requesting an exception pursuant to this section shall file its request 2 months prior to the date that requests for bids must be issued.

§ 10 EXTENSION OF DATE FOR UTILITY TO DIVEST GENERATION ASSETS

A. Procedure; Order

A utility may apply to the Commission to exercise its authority under 35-A M.R.S.A. § 3204(3) to allow it to divest one or more generation assets or generation-related business activities after March 1, 2000. The application shall be filed on or before December 1, 1999, and shall include all information that justifies the request. A utility may file subsequent applications for additional extensions. The Commission shall provide an opportunity for interested persons to be heard on the application and shall rule on the application within 2 months after it is filed. The Commission shall grant an extension of the divestiture deadline if it finds that an extension would likely improve the sale value of the generation assets or the generation-related business activities or would be likely to reduce the level of the utility's stranded costs. The Commission shall establish the length of the extension in its Order and shall specify whether the utility must divest the asset or business activity on the date specified in the Order or whether it may divest on or before that date. The Commission may order that any divestiture be subject to the right of a purchaser of the capacity and energy pursuant to this Chapter to make purchases from the new owner of the generation asset or generation-related business activity until the date specified in the contract between the purchaser and the utility.

B. Obligation to Sell Capacity and Energy

The granting of an extension under this section does not exempt a utility from the obligation to sell the capacity and energy from a generation asset whose divestiture date is extended. If an extension is granted reasonably in advance of August 1, 1999, the capacity and energy from the generation asset whose divestiture date is extended may be included in the utility's request for bids issued on August 1, 1999. If the extension is granted on a date that is too late for the capacity and energy to be included in the request for bids issued on August 1, 1999, the Commission may order a separate bidding process for the sale of the asset's capacity and energy. The Commission will determine the duration of the sale of the capacity and energy from a generation asset or generation-related business activity whose divestiture date is extended. The Commission may direct that the capacity and energy be sold in the regional wholesale bulk power markets until the selection of a purchaser or until the asset is divested.

§ 11 WAIVER

Upon the request of any person subject to this Chapter or upon its own motion, the Commission may, for good cause, waive any requirement of this Chapter that is not required by statute. The waiver may not be inconsistent with the purposes of this Chapter or Title 35-A. The Commission, the Director of Technical Analysis, or the presiding officer assigned to a proceeding related to this Chapter may grant this waiver.

BASIS STATEMENT: The factual and policy basis for this rule is set forth in the Commission's Order Provisionally Adopting Rule and Statement of Factual and Policy Basis, Commission Docket No. 98-824, issued on February 22, 1999, in the Commission's Order Finally Adopting Rule and Statement of Policy Basis issued on June 29, 1999, and in the Commission's Supplemental Order Finally Adopting Rule and Statement of Policy Basis, issued on September 28, 1999. Copies of this Order and Statement have been filed with this rule at the Office of the Secretary of State. Copies may also be obtained from the Administrative Director, Public Utilities Commission, 242 State Street, 18 State House Station, Augusta, Maine 04333-0018.

AUTHORITY: 35-A M.R.S.A. §§ 104, 111, 3203(9), 3204(3), 3204(4); Resolves 1999, ch. 38; P.L. 1999, ch. 398, Sec. N-2.

EFFECTIVE DATE: This rule was approved as to form and legality by the Attorney General on 10/1/99. It was filed with the Secretary of State on 10/15/99 and will be effective on 11/4/99.